

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JULIE M. J.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

CASE NO. 2:21-CV-1491-DWC

ORDER AFFIRMING  
DEFENDANT'S DECISION TO  
DENY BENEFITS

Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of the denial of Plaintiff's applications for disability insurance benefits. Pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Rule MJR 13, the parties have consented to proceed before a United States Magistrate Judge.

BACKGROUND

Plaintiff originally filed for disability insurance benefits on September 3, 2010 alleging an onset date of December 31, 2007. Administrative Record (AR) 103-104. At the time of Plaintiff's alleged disability onset she was 36 years old, had a high school education, past

1 relevant work as a waitress, hostess, employment interviewer, and receptionist. AR 1563.

2 Plaintiff had also served in the United States Army. *Id.*

3       After departmental denials of Plaintiff's first application, the first hearing before an  
4 Administrative Law Judge (ALJ) was held on May 8, 2012 and resulted in an unfavorable  
5 decision dated June 6, 2012. AR 17-38. Plaintiff appealed to the United States District Court for  
6 the Western District of Washington (this Court), which reversed and remanded for further  
7 proceedings. AR 1226-1241.

8       A second hearing was held before an ALJ on December 15, 2015 and resulted in a second  
9 unfavorable decision dated May 13, 2016. AR 1246-1277. This time the Appeals Council  
10 reversed the ALJ's decision and remanded the case for a third ALJ hearing. AR 1278-1283. A  
11 third hearing was held July 10, 2019, which resulted in a third unfavorable decision dated July  
12 23, 2019. AR 1071-1095. Plaintiff again appealed to this Court and on May 21, 2020 this Court  
13 once again reversed and remanded for further proceedings. AR 3130-3138.

14       A fourth ALJ hearing was held on July 7, 2021, which resulted in yet another unfavorable  
15 decision, dated July 22, 2021. AR 3019-3047, 3058-3096. On November 4, 2021, Plaintiff  
16 initiated a third appeal to this Court. Dkt. 1. In her Opening Brief she maintains that the ALJ  
17 erred by failing to properly evaluate some of her subjective reporting, some of the medical  
18 evidence, and the determination by the Department of Veterans Affairs (VA) that she is entitled  
19 to VA unemployment benefits. Dkt. 10. The Commissioner maintains the ALJ's decision is  
20 supported by substantial evidence and free from legal error. Dkt. 11.

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THE ALJ's FINDINGS

The ALJ found that during the relevant period<sup>1</sup> Plaintiff had the severe impairments of fibromyalgia, obesity, bilateral calcific shoulder tendonitis, mild bilateral median and carpal tunnel syndrome, depressive disorder, anxiety disorder, personality disorder, and post-traumatic stress disorder (PTSD). AR 3025.

The ALJ assessed Plaintiff with the residual functional capacity (RFC) to perform sedentary to light work as defined in 20 CFR 404.1567(a)-(b), limited by the need to stand and/or walk at least two hours but less than six hours in an eight-hour day, and the need to sit for two hours but less than six hours in an eight-hour workday, for a total of six to eight hours of sitting, standing, or walking. AR 3029. The ALJ further assessed that Plaintiff could lift 20 pounds occasionally and ten pounds frequently, she could frequently perform bilateral handling, fingering, and reaching in all directions, and she could occasionally crawl, crouch, kneel, stoop, and climb ladders, ropes, scaffolds, ramps, and stairs. *Id.* The ALJ determined that Plaintiff would need to avoid concentrated exposure to hazardous machinery and vibration. *Id.*

The ALJ further determined that Plaintiff had the ability to understand, remember, and carry out simple instructions, exercise simple workplace judgment, and perform work that is learned by on-the-job training ranging from a short demonstration up to and including one month. *Id.* The ALJ determined that Plaintiff could respond appropriately to supervision but would not be able to work in close coordination with coworkers in a teamwork setting. *Id.*

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<sup>1</sup> The relevant period is December 2007 (when Plaintiff alleges she became disabled) through June 2014 (when she was last insured).

1 Finally, the ALJ assessed that Plaintiff could deal with occasional changes in the work  
 2 environment but could only work in jobs requiring no interaction with the general public, even  
 3 where the public was present. *Id.*

#### 4 STANDARD OF REVIEW

5 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
 6 social security benefits if the ALJ's findings are based on legal error or not supported by  
 7 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th  
 8 Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)). However, the  
 9 Commissioner's decision must be affirmed if it is supported by substantial evidence and free of  
 10 harmful legal error. 42 U.S.C. § 405(g); *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir.  
 11 2008).

12 Substantial evidence "is a highly deferential standard of review." *Valentine v. Comm'r of*  
 13 *Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009). The U.S. Supreme Court describes it as  
 14 "more than a mere scintilla." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1153 (2019). "It means—and  
 15 means only—such relevant evidence as a reasonable mind might accept as adequate to support a  
 16 conclusion." *Id.* (internal quotations omitted).

#### 17 DISCUSSION

##### 18 I. The ALJ provided specific, clear, and convincing evidence for discrediting some of 19 Plaintiff's subjective reports.

20 Plaintiff's principle objection to the ALJ's denial of her claim is that he found her  
 21 headaches were not severe and her mental health impairments did not affect her memory,  
 22 concentration, ability to complete tasks, and ability to get along with others. Dkt. 10 at 11.  
 23 Before turning to the ALJ's specific discussion of these issues it must be noted that the ALJ  
 24 found Plaintiff, herself, was an unreliable reporter. The ALJ wrote:

1 **The claimant's activities indicate that the claimant was capable of more than**  
 2 **she has alleged.** For example, in January 2009, the claimant was enrolled in school  
 3 taking 19 credits and working 16-19 hours per week in order to maintain her  
 4 childcare benefit for her three-year-old son (12F/80). She was going to school to  
 5 earn a certificate as a medical assistant. She was in her fourth quarter when she  
 6 stopped in April 2010, but she indicated that she planned to resume in the fall  
 7 (5F/75). Up to that point, she denied that change in mood had significantly  
 8 interfered with her "very good performance" in her classes or her progression  
 9 toward her degree (5F/91). At the time she stopped school, she explained to her  
 10 therapist that this was because her "graveyard shift" threw off her sleeping  
 11 schedule, and she started sleeping through her classes (5F/85). She quit her job as  
 12 a hostess to preserve her grades in school and then temporarily withdrew from  
 13 school due to feeling overwhelmed. It does not appear that the claimant returned to  
 14 school, but she attributed this to lack of finances, rather than psychological barriers  
 15 (16F/12, 71). Later, she attributed her failure to complete the remaining three  
 16 classes in her program to her inability to type due to carpal tunnel syndrome  
 17 (14F/15). **The claimant returned to her studies after the date last insured, but**  
 18 **she reported that she stopped short of completing them because (she believed)**  
 19 **she would be "kicked off" her VA benefits if she finished professional**  
 20 **schooling (31E/12).** While it does not appear that the claimant was able to maintain  
 21 her schooling and work schedule at the same time for very long during the relevant  
 22 period, her ability to sustain both for several months at a time and do one or the  
 23 other suggests that she was not markedly limited in either her mental or her physical  
 24 capacities. Without the sleep deprivation of her night shift or a reported carpal  
 tunnel exacerbation, her reports indicate that she could have completed her  
 schooling. **This suggests that she had sufficient memory, understanding, and**  
**concentration to sustain multiple college level courses at a time. Her reports**  
**do not reflect social difficulties with attending these classes. Meanwhile, she**  
**performed work as a restaurant hostess, which would have been at least at the**  
**light level and would have required interacting with coworkers and the public,**  
**and she reported stopping because she needed to focus on her studies.**

AR 3037-3038 (emphasis added). The ALJ further stated:

Evidence in the record also suggests an issue of **secondary gain**. The claimant's  
 long-standing therapist noted that the claimant eschewed treatment goals, including  
 coping skills and self [-]improvement goals, in favor of working to obtain 100-  
 percent service-connected disability and unemployability through the VA (14F/13).  
 In July 2014, the claimant requested a **new counseling referral "so that I can get**  
**the counseling I need for my service-connected PTSD"** (18F/85).

In 2019, the claimant testified that **she received \$3,174 in benefits from the VA**  
**per month for having been found "unemployable."** She acknowledged that she  
**did not have to pay tax on that income** and received other benefits such as **free**  
**car tags and medical coverage, and that she would lose the benefits for**  
**unemployability if she went to work.** She also acknowledged that she did not

complete her coursework to become a medical assistant, stopping a quarter short of completion, because she believed she would be “kicked off” her disability payments if she completed it (31E/9-12). The undersigned notes that her **monthly benefit from the VA far exceeds any average monthly income in her work history since the 1990s** (see 34D).

AR 3039 (emphasis added).

Plaintiff does not dispute that the ALJ’s above rejection of her subjective reporting is legally sufficient.<sup>2</sup> A reviewing court “will not consider any claims that were not actually argued in [a plaintiff’s] opening brief.” *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929-30 (9th Cir. 2003)(citing *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994)). Therefore, the Court turns to Plaintiff’s two impairment-specific arguments mindful that the ALJ’s rejection of Plaintiff’s subjective testimony was legally sound, and that fact permeated the ALJ’s assessment of all other evidence that credited Plaintiff’s self-reports.

#### A. Headaches

First, Plaintiff argues that the ALJ wrongly determined at step two of the sequential analysis that headaches were not among her severe impairments, then failed to include Plaintiff’s alleged limitations caused by headaches in her RFC. Dkt. 10 at 4. The ALJ stated:

The claimant has alleged that migraines are one of her debilitating conditions. The record contains a diagnosis of migraines, and treatment notes reflect allergies or sensitivity to some medications typically used to treat migraines, such as sumatriptan and nortriptyline (see 1F/1). The claimant has alleged that she has migraines ranging from one a week to one a month and that they can last for days. **The medical record does reflect some intermittent treatment for migraines** (see, e.g., 5F/61, 80, 101). Her headache complaints were sometimes in the setting of concurrent sinus symptoms (see, e.g., 5F/25, 80). **However, the record does not document the alleged frequency, severity, or intractability of her migraines.** For instance, she tolerated an injection of ketorolac tromethamine well (14F/45).

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<sup>2</sup> To reject a claimant’s subjective complaints, the ALJ must provide “specific, cogent reasons for the disbelief.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996) (citation omitted). The ALJ “must identify what testimony is not credible and what evidence undermines the claimant’s complaints.” *Id.*; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Unless affirmative evidence shows the claimant is malingering, the ALJ’s reasons for rejecting the claimant’s testimony must be “clear and convincing.” *Lester*, 81 F.2d at 834.

1 The undersigned does not find that migraines were a severe impairment causing  
2 more than minimal interference in the claimant's ability to perform work activities.  
3 **Nevertheless, headaches, along with other chronic pain, have been considered**  
4 **in the assessment of her residual functional capacity and are accommodated**  
5 **with such limitations as sedentary to light exertion and avoidance of**  
6 **concentrated exposure to vibration and hazards.**

7 AR 3025 (emphasis added).

8 The ALJ further noted that Plaintiff's pain issues in general appeared to be linked to "life  
9 stressors", and that "positive situations and management of stressors had a reverse effect on  
10 symptoms." AR 3036. He identified a pattern in Plaintiff's record of exacerbated mental  
11 symptoms aligned with situational stressors that were reduced when these stressors were  
12 reduced, "indicat[ing] that such transient worsening did not stem entirely from her underlying  
13 disease process and that the waxing and waning of the claimant's symptoms was due less to  
14 lability or uncontrolled anxiety than to life circumstances." AR 3037.

15 According to Plaintiff, the record belies these findings. Dkt. 10 at 4-5. She points to  
16 several instances in the record documenting complaints of headaches, many of which are outside  
17 the relevant period. *Id.* at 5-6. Nevertheless, the Court has reviewed the records Plaintiff relies  
18 upon that fall between her alleged onset date of December 31, 2007 and her date-last-insured in  
19 June 2014, and finds that many of them simply reflect Plaintiff's self-reporting of a history of  
20 migraines (AR 749, 469, 412, 516, 1003, 989, 2126, 1672, 1824).

21 The records documenting treatment for an active migraine are few and far between, with  
22 only one date in 2009 (AR 712), one date in 2010 (AR 432), three dates in 2011 (AR 579, 989,  
23 1011, 958) and one date in 2013 (1794). These records are consistent with the ALJ's finding that  
24 the evidence reflects intermittent treatment for migraines but does not document the alleged  
frequency, severity, or intractability she claims. AR 3025. Coupled with the undisputed finding  
that Plaintiff's activities during the relevant period were inconsistent with her subjective

1 symptom reporting and Plaintiff has exhibited secondary gain motivations, the Court finds the  
 2 ALJ provided specific, cogent reasons to disbelieve Plaintiff's reports about the degree to which  
 3 headaches impacted her ability to work during the relevant period. *See Lester*, 81 F.3d at 834.

#### 4 B. Mental Impairment

5 Next, Plaintiff contends the ALJ wrongly rejected her testimony that her "mental  
 6 symptoms" prevent her from working. Dkt. 10 at 10.

7 Regarding Plaintiff's mental health symptoms the ALJ stated:

8 *In understanding, remembering, or applying information*, the claimant had a mild  
 9 limitation. In a mental status examination in January 2011, she demonstrated  
 10 "grossly normal responses," according to the examiner. She could repeat digits  
 11 backward up to four and make correct change. She could recall only one of three  
 12 objects clearly and two approximately after three minutes, and in a second trial she  
 13 could remember two of three objects clearly and a third approximately after six  
 14 minutes. **The examiner found that she did not appear to have any impairment**  
 15 **in her capacity to reason, understand, or remember (7F/2-3).** Her providers  
 found her thought processes generally organized and logical (see, e.g., 5F/33, 42,  
 54, 65, 96, 105, 107; 7F; 12F/44, 62, 85, 96; 14F/6, 12, 40, 70, 94, 102; 16F/9) and  
 her judgment and insight to be intact (see, e.g., 12F/44, 62, 68, 96; 16F/16, 40, 45,  
 51, 59, 70, 98). **Her providers did not make objective findings of memory**  
**deficits.** Although she had complaints of fatigue, she usually presented alert and  
 fully oriented (see, e.g., 1F/3; 5F/73, 85, 96; 6F; 7F; 9F/35; 12F/44, 62, 85, 96,  
 108).

16 *In interacting with others*, the claimant had a moderate limitation. Dr. Sandvik, a  
 17 consultative psychiatric examiner, noted that the claimant appeared not to have  
 18 good interpersonal skills and acknowledged having problems with anger and a  
 history of difficulty relating to groups. **However, she denied ever becoming**  
**assaultive or breaking things in anger** and stated that being alone calmed her.  
 19 **She also endorsed having learned from therapy "not to react" to situations**  
**that made her angry (7F).** In some office visits, the claimant showed depressive,  
 20 anxious, labile, or irritable affect (see, e.g., see, e.g., 5F/70, 73, 85; 16F/64), **but**  
**more often she presented with normal, appropriate, or "euthymic"**  
**mood/affect** (see, e.g., 5F/32, 35, 42, 50, 54, 59, 65, 68, 74, 91, 97, 105; 12F/44,  
 21 96; 14F/6, 8, 12, 70, 72, 76; 16F/12, 44, 70, 116). Although she presented with  
 rapid speech from time to time, **she remained organized and logical** (see, e.g.,  
 22 12F/90; 14F/72; 16F/9), and **usually her speech was normal in rate, tone, and**  
**volume** (see, e.g., 5F/32, 42, 51, 65, 70, 73, 88, 96, 107; 7F; 12F/44, 62, 85; 14F/5,  
 23 16, 40, 70, 83, 102). **Providers noted normal eye contact** (see, e.g., 12F/85;



1 16F/16, 40, 70, 98) **and cooperative behavior** (see, e.g., 12F/44, 62, 85; 14F/50;  
2 16F/70, 98, 147).

3 With regard to *concentrating, persisting, or maintaining pace*, the claimant had a  
4 mild limitation. In a mental status examination in January 2011, **she demonstrated**  
5 **“grossly normal responses,” subtracting serial sevens accurately, repeating**  
6 **digits backward up to four, and presenting her responses coherently and**  
7 **relevantly** without being circumstantial or tangential (7F/2). As noted above, she  
8 **generally presented with organized, logical thought processes. She generally**  
9 **presented without fidgeting or restlessness** (see, e.g., 5F/32, 35, 42, 51, 59, 65,  
10 91; 9F/118; 14F/45; 16F/9). **Providers also noted normal attentiveness** (see, e.g.,  
11 12F/96; 16F/16, 40, 58).

12 AR 3028 (emphasis added). Thus, the ALJ concluded that “Despite her symptoms ... the medical  
13 evidence is not consistent with allegations indicating incapacity due to mental [health issues].”

14 AR 3034.

15 Plaintiff argues the ALJ erred by “cherry picking” examples of temporary relief that  
16 actually only reflect “the waxing and waning” nature of mental health conditions. Dkt. 10 at 10.  
17 Plaintiff directs the Court to the opinion of Jennifer Palermo, Ph.D. (Palermo) who examined  
18 Plaintiff and reviewed her VA records. Dkt. 10 at 11; AR 2731.

19 As the Court finds, *infra*, that the ALJ’s treatment of Palermo’s opinion was legally  
20 sufficient, the Court commences to the next argument.

21 II. The ALJ provided legally sufficient reasons to find the opinions of David Sandvik  
22 M.D. and Jennifer A. Palermo, Ph.D. only partially reliable.

23 Plaintiff was seen by examining physician David Sandvik, M.D. at the request of the  
24 Social Security Administration, and by examining psychologist Jennifer A. Palermo, Ph.D. at the  
request of the VA. According to Plaintiff the ALJ erred when he discredited their opinions.

A. David Sandvik, M.D.

David Sandvik, M.D. (Sandvik) performed a consultative evaluation of Plaintiff on  
January 7, 2011. AR 500-02. The ALJ summarized Sandvik’s evaluation, beginning by stating:

1 In a consultative psychiatric evaluation with Dr. Sandvik in January 2011, the  
2 claimant presented fairly well groomed with **normal to mildly depressed mood.**  
3 **She was attentive and spoke coherently and relevantly, and her presentation**  
4 **was incongruent with her complaints, which the examiner noted to be**  
5 **“somewhat dramatic.”** The **cognitive examination was grossly normal,**  
6 including abilities to follow a three-step command, perform accurate serial-seven  
7 calculations, make change, repeat up to four digits in reverse, and recall two of  
8 three objects after six minutes. Dr. Sandvik noted unimpaired ability to reason,  
9 understand, and remember. The claimant did not appear to have good interpersonal  
10 skills, but she was cooperative in the exam (7F).

11 AR 3035 (emphasis added).

12 The state agency psychological findings and **Dr. Sandvik’s opinion are given**  
13 **some weight.** They are supported by a summary of evidence and Dr. Sandvik’s  
14 evaluation narrative and findings. **Dr. Sandvik noted that the claimant reported**  
15 **anger problems and appeared not to have good interpersonal skills, but she**  
16 **maintained normal to slightly depressed affect during the exam,** reported that  
17 being alone could calm her, and denied ever becoming assaultive or breaking things  
18 in anger. She also endorsed having learned from therapy “not to react” to situations  
19 that made her angry (7F). The state agency findings and Dr. Sandvik’s opinion are  
20 largely consistent with the longitudinal evidence. For instance, the claimant had  
21 normal cognitive findings, as well as generally appropriate interactions with  
22 providers and a usual lack of acute distress, alongside reports of irritability, anger,  
23 and anxiety with situational stressors. **However, the state agency findings and**  
24 **Dr. Sandvik’s opinion are vague as to the claimant’s workplace interactive**  
**limitations, and they do not appear to adequately consider the stress and**  
**adaptive demands of detailed or complex work tasks, particularly in light of**  
**the claimant’s reported history of anxiety over work performance demands**  
**and notes reflecting reactivity to stressors.** The undersigned finds that the  
evidence overall supports further limitation in the complexity of her work tasks and  
more specific limitations in the claimant’s interactions, as described in the finding  
above.

AR 3042 (emphasis added)

Plaintiff argues the ALJ committed harmful error by failing to clarify what he identified  
as “vagueness” in Sandvik’s opinion, as he is required to do under *Smolen v. Chater*, 80 F.3d  
1273, 1279 (9th Cir. 1983), and because discounting Sandvik for failing to consider the demands

1 of detailed and complex work tasks is not a specific and legitimate reason<sup>3</sup> to reject his opinion.  
2 Dkt. 10 at 13.

3 The Court concurs with the Commissioner that Plaintiff's arguments are premised upon a  
4 misreading of the ALJ's analysis. *See* Dkt. 11 at 10. First, an ALJ's finding that a doctor's  
5 conclusions about a Plaintiff are vague (i.e., Sandvik stating Plaintiff has "some difficulty" with  
6 social interactions) is not tantamount to a finding that the record is inadequate to allow for proper  
7 evaluation of the evidence. Though Plaintiff is correct that an inadequate record triggers the  
8 ALJ's duty to further develop it further, that is not what the ALJ encountered in this case  
9 involving a record in excess of 3000 pages. *See* Dkt. 8; *see also* *Tonapetyan v. Halter*, 242 F.3d  
10 1144, 1150 (9th Cir. 2001)(ALJ's duty to fully and fairly develop the record may be discharged  
11 "in several ways, including: subpoenaing the claimant's physicians, submitting questions to the  
12 claimant's physicians, continuing the hearing, or keeping the record open after the hearing to  
13 allow supplementation of the record.")(internal citations omitted).

14 Second, the ALJ concluded that Sandvik's vague limitations assessment did not provide  
15 much insight into her specific functional limitations, and therefore gave Plaintiff the benefit of  
16 the doubt regarding the limits on the complexity of work she remains capable of performing,  
17 limiting her residual functional capacity to simple work. AR 3029, 3042. The ALJ also  
18 accounted for Plaintiff's issues with social interaction by finding she could not work closely with  
19 coworkers in a teamwork setting and could have no public interaction. AR 3029. Thus, to the  
20 extent the ALJ discounted Sandvik's opinion the result actually benefited Plaintiff because the  
21 ALJ found her to be more limited than did Sandvik.

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23 <sup>3</sup> Plaintiff applied for disability benefits before March 27, 2017, so the medical evidence rules in 20 C.F.R.  
24 § 404.1527 apply to her claim rather than the revised regulations that apply to claims filed on or after March 27,  
2017. *See* 20 C.F.R. § 404.1520c.

1 B. Jennifer Palermo, Ph.D.

2 Plaintiff also contends the ALJ harmfully erred by failing to fully credit the opinion of  
 3 Jennifer Palermo, Ph.D. (Palermo) who examined Plaintiff in March 2016 and completed a  
 4 disability benefits questionnaire in conjunction with Plaintiff's VA disability benefits  
 5 application. AR 2730-2739.

6 The ALJ stated the following regarding Palermo's report:

7 Dr. Palermo opined that the claimant met the criteria for PTSD and checked boxes  
 8 on the VA form indicating that the claimant had difficulty adapting to stressful  
 9 circumstances, including work or a work-like setting, and inability to establish and  
 10 maintain effective relationships. Dr. Palermo also marked boxes indicating that the  
 11 claimant's symptoms caused clinically significant distress or impairment in social,  
 12 occupational, or other important areas of functioning, and that she had occupational  
 13 and social impairment with reduced reliability and productivity (34F/3, 8-9).

14 **The undersigned gives this opinion little weight.** First, the opinion is **vague** as to  
 15 the degree of occupational and social impairment and articulates **no specific**  
 16 **workplace limitations**, such as inability to work with the public or perform  
 17 detailed tasks. "Clinically significant" is **undefined and does not necessarily**  
 18 **equate to "marked impairment" of vocational capacity.** Notably, the focus of  
 19 this examination was to determine if the claimant had impairment of social and  
 20 occupational functioning and **whether that impairment was service-connected—**  
 21 **a criterion that is not relevant to the Social Security disability analysis.**

22 Second, the opinion and the underlying **examination in February 2016 came**  
 23 **more than a year and a half after the date last insured.** Dr. Palermo did review  
 24 earlier records, some of them back in the 1990s (see 34F/5), but **she did not**  
**articulate specific evidence or reasons from those records to support her**  
**opinion that the claimant would have "occupational and social impairment**  
**with reduced reliability and productivity."** Meanwhile, the claimant was noted  
 to present her historical and symptom severity "in a somewhat dramatic manner,"  
 and the mental status examination was otherwise mostly normal. She persistently  
 clicked her pen during the evaluation **but otherwise presented with euthymic**  
**mood and affect, normal eye contact, logical thought process, normal ability**  
**to track the conversation, full orientation, normal performance in memory**  
**and concentration tasks, and ability to abstract.** She arrived on time with  
 appropriate dress and grooming (34F/9-10). The exam findings do not support  
 significant problems with reliability (i.e., attendance or working within a schedule),  
 communicating effectively in a work setting, attending to or focusing on tasks,  
 remembering or following instructions, or interacting appropriately with others in  
 a setting without demand for teamwork.

1 Third, while the claimant's reported symptoms in the exam would provide some  
 2 support for Dr. Palermo's opinion, the severity and limiting effects of these  
 3 symptoms are undercut by Dr. Palermo's observation that the claimant was  
 4 **"somewhat dramatic" in her presentation— suggesting symptom  
 magnification. This observation is consistent with other evidence in the record  
 of symptom magnification and secondary gain focus, discussed above under  
 "Other Factors."**

5 Finally, the claimant's subjective report and Dr. Palermo's opinion (insofar as it  
 6 suggests marked limitations) are not entirely consistent with the evidence as a  
 7 whole. For instance, contemporary and later medical records reflect little treatment  
 8 for mental health concerns until the claimant encountered increasing stressors with  
 9 the deterioration of her mother's mental health in 2021, resulting in the claimant  
 10 having care duties (see 47F/42, 51, 62). The claimant engaged briefly in cognitive  
 11 behavioral therapy and psychiatry in 2018, presenting with generally unremarkable  
 12 mental status (see 46F/1, 4, 11, 16, 20, 24), **but otherwise her treatment after the  
 date last insured reflected mostly physical or dental concerns** (see generally  
 13 40F; 41F; 42F; 43F; 44F; 46F; 48F/46-47). As for the relevant period, the evidence  
 14 is consistent with some level of social and occupational impairment, but not to a  
 15 marked degree. The claimant had mental health treatment and complaints of anger,  
 16 irritability, anxiety, and depressed mood, **but much of the focus in treatment was  
 on managing situational stressors**, and the objective mental status findings were  
 17 largely benign. She was often able to show normal mood and affect, and even with  
 18 visible anxiety, low mood, or irritability, the claimant presented as organized and  
 19 logical, with generally normal thought content, alertness, and full orientation. **She  
 had positive response to counseling and medications, adapted to her stressors  
 over time, and engaged in work, school, and other activities indicating less  
 social and cognitive impairment than alleged.** The evidence supports finding her  
 20 limited, but the undersigned has accounted for her limitations in the residual  
 21 functional capacity finding above.

22 AR 3042-3043 (emphasis added).

23 When a treating or examining physician's opinion is contradicted, the opinion can be  
 24 rejected "for specific and legitimate reasons that are supported by substantial evidence in the  
 record." *Lester*, 81 F.3d at 830-31 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995);  
*Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can accomplish this by "setting  
 out a detailed and thorough summary of the facts and conflicting clinical evidence, stating [her]  
 interpretation thereof, and making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)  
 (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

1 Plaintiff is certainly correct that the ALJ must not “cherry-pick” instances of no or low  
2 symptomology without considering the context, such as instances of high symptomology. *See*  
3 *Reddick v. Chater*, 157 F.3d 715, 722-23 (9th Cir. 1998) (an ALJ must not “cherry-pick” certain  
4 observations without considering their context); *see also Attmore v. Colvin*, 827 F.3d 872, 875 (9th  
5 Cir. 2016) (quoting *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999) (the Court “cannot affirm  
6 ... ‘simply by isolating a specific quantum of supporting evidence,’ but ‘must consider the record  
7 as a whole, weighing both evidence that supports and evidence that detracts’).

8 Nevertheless, the Court does not concur with Plaintiff that the ALJ committed this error.  
9 To the contrary, the Court finds Plaintiff’s invitation to focus on records that support Palermo’s  
10 diagnosis the very definition of prohibited cherry-picking. Dkt. 10 at 11 (citing AR 1017, 1664,  
11 1676, 1675, 1671, 1607, 1731, 1723, 1721, 2077, 2164). The Court declines, as doing so is  
12 incongruous with the intent of the Social Security Act. *See e.g., White v. Comm’r Soc. Sec.*, 572  
13 F.3d 272, 285 (6th Cir. 2009) (“The problem with [plaintiff’s] cherry picking argument, however  
14 is that it cuts both ways. She too cherry picks data.”).

15 Instead, the Court finds that the ALJ provided more than specific and legitimate reasons  
16 to discount Palermo: (1) her opinion was formulated almost two years after Plaintiff’s date-last-  
17 insured, (2) it was based in-part on records pre-dating and post-dating the relevant period, (3) it  
18 did not clarify which records supported what alleged limitations, (4) it noted that Plaintiff’s  
19 presentation was “somewhat” dramatic, and (5) it was conducted for the purpose of determining  
20 if Plaintiff had a VA “service connected” impairment, not to determine whether she was disabled  
21 within the meaning of the Social Security Act. Therefore, the Court finds the ALJ’s treatment of  
22 Palermo’s opinion was legally sufficient.  
23  
24

1        III.     The ALJ did not err in his consideration of the VA's determination that Plaintiff was  
 2                unemployable effective June 18, 2010.

3                In April 2016 the VA determined Plaintiff was entitled to unemployment benefits,  
 4                effective June 18, 2010. The ALJ took note of this determination, stating:

5                The claimant is a U.S. Army veteran who served in 1994 and 1995 (21E). She began  
 6                receiving VA service compensation payments in June 2005 as a veteran with three  
 7                dependents, based on service-connected left shoulder bursitis (30%), right hip  
 8                bursitis (10%), and lumbar strain (20%) (2F/2-3). Beginning in September 2011,  
 9                she received benefits as a veteran with two dependents, based on service-connected  
 10              PTSD (70%), right hip bursitis (10%), migraine headaches (50%), left shoulder  
 11              bursitis (30%) and lumbar strain (20%) (17E/1-2; 15F). She was initially denied  
 12              entitlement to the 100% rate (individual unemployability) because it was not shown  
 13              that she was unable to work because of service-connected disability (17E/3). In  
 14              April 2016, she was granted individual unemployability effective June 18, 2010  
 15              (21E/2).

16              AR 3043-3044. Nevertheless, the ALJ gave little weight to the VA's determination because  
 17              "there is no reference to specific work activities, functional limitations, signs, symptoms,  
 18              findings or impairments", and because "the voluminous VA records submitted by the claimant  
 19              do not support greater limitations than already found within the above residual functional  
 20              capacity." *Id.*

21              The Ninth Circuit requires the ALJ to ordinarily give "great weight" to a VA disability  
 22              determination due to the similarity between the VA's and Social Security Administration's  
 23              (SSA) programs, however, "because the VA and SSA criteria for determining disability are not  
 24              identical ... the ALJ may give less weight to a VA disability rating if he gives persuasive,  
 specific, valid reasons for doing so that are supported by the record." *See McCartey v.*  
*Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002)(citing *Chambliss v. Massanari*, 269 F.3d 520,  
 522 (5th Cir. 2001)).

                Plaintiff argues the ALJ failed to give this determination its due credit because the VA's  
 process is "akin to determining the veteran's residual functional capacity in the Social Security



1 process, and then determining if there is a substantially gainful occupation available given the  
2 physical and mental limitations imposed by service-connected disabilities.” Dkt. 10 at 16.

3 Plaintiff is incorrect. The ALJ specifically found that the VA “does not assess a residual  
4 functional capacity and submit that capacity to a vocational expert to determine the availability  
5 of occupations” and that the percentages of disability the VA assigns to a claimant’s impairments  
6 “do not refer to any symptoms, signs, findings” and do not correlate with the Social Security  
7 Administration’s criteria for determining disability. AR 3043-3044. The Court finds these to be  
8 persuasive, specific, valid reasons to not give the VA’s disability determination great weight in  
9 this particular case.

10 IV. The ALJ did not err in his step five determination.

11 Plaintiff’s final argument—that the ALJ’s residual functional capacity analysis and step  
12 five finding that Plaintiff remains capable of performing other work are erroneous—assumes her  
13 above rejected arguments were victorious. Dkt. 10 at 17. Having determined, instead, that all of  
14 Plaintiff’s arguments lack merit the Court need not address this one.

15 CONCLUSION

16 In conclusion, this Court finds the ALJ’s determination that Plaintiff was not disabled is  
17 supported by substantial evidence and free of harmful legal error. Accordingly, the  
18 Commissioner’s final decision is affirmed.

19  
20 Dated this 2nd day of May, 2022.

21 

22 David W. Christel  
23 United States Magistrate Judge  
24